DATE: June 1, 1998
CASE NO. 96-INA-475

In the Matter of:

DANIELLE PROSCIUTTO, INC.
Employer

On Behalf of:

JAN KALATA
Alien

APPEARANCE: John A. Nicelli, Esq.
For the Employer

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of Unite States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On August 15, 1995, the Employer, Daniele Prosciutto, Inc., filed an application for labor certification to enable the Alien, Jan Kalata, to fill the position of "repairer," which was classified by the Job Service as "Machine Repairer, Maintenance. The job duties for the position were described as follows:

> Inspect, install, repair, maintain & test machinery & equipment used in the processing of proscuitto (sic) & meat products, observes machinery such as velati grinder, visconti cuber, handtmann stuffer, iosselli stuffer, velati fat washer to detect & diagnose mechanical defect or malfunction. Disassembles equipment using hand & power tools. Replace defective parts. Installs new equipment & modifies existing installations following (sic) blueprints & technical advise (sic) or (sic) engineers.

(AF 82).

The stated requirements for the position are: a sixth grade education and 2 years experience in the job offered (AF 82).

The CO issued a Notice of Findings on April 19, 1996, proposing to deny certification on the grounds, *inter alia*, that the stated requirements are not the minimum job requirements for the job opportunity (AF 17-19).[1]

The Employer submitted its rebuttal, dated May 28, 1996 (AF 40-46). The CO found the rebuttal unpersuasive and issued a Final Determination on June 13, 1996, denying certification on the same grounds (AF 9-10).

On or about July 15, 1996, the Employer filed a motion for reconsideration of the denial of labor certification, together with various additional documents (AF 2-8). On August 21, 1996, the CO denied the Employer's request for reconsideration, and subsequently forwarded this matter to the Board of Alien Labor Certification Appeals for review.

Discussion

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[1]The CO cited §656.20(b)(6). (AF 18). However, this section was re-codified as §656.21(b)(5).

Section 656.21(5) provides that the employer shall document that its requirements for the job opportunity represent its actual minimum requirements, and that it has not hired workers with less training or experience for jobs similar to that involved in the job opportunity, or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

In the Notice of Findings, the CO stated, in pertinent part:

> From a review of the alien's qualifications on ETA 750, Form B, it appears the alien does not meet the minimum requirement desired by the employer. **In specific (sic), the alien does not appear to have prior to hire experience in:**
>
> * Two years experience in the job offered of repairing the above job duties.
>
> **The employer must provide documentation to show that the alien me (sic) the employer's requirement prior to hire in the position for which certification is sought**...
>
> **In the alternative, the employer may reduce the requirements, amend and initial the application and conduct a new recruitment...**

(AF 18).

The Employer's rebuttal consists of a cover letter by its attorney, dated May 24, 1996 (AF 11), a foreign-language, notarized statement signed by the Alien on May 24, 1996 (AF 12), which was translated into English (AF 13), and a letter, dated May 22, 1996, signed by Employer's President, Vlado R. Dukcevich (AF 14-15).

Employer's counsel states that the letter from the Employer and the affidavit of the Alien establish that the Alien had more than two years experience for the position "at the time the labor certification was submitted." (AF 11). The notarized statement by the Alien indicates that the Alien worked at the Mechanical & Car Shop in Poland from January 1974 to March 1986. The Alien described his job duties as follows:

> ...I inspected, installed, repaired, maintained and tested all types of commercial and industrial machinery...The items repaired were generally brought to my place of employment from other state owned enterprises. My function was also to detect and diagnose mechanical defects or malfunctions. I also disassembled equipment using hand and power tools and replaced defective parts. In addition, I also installed new equipment, modified existing equipment and machinery according to blueprints and technical advise (sic)...
>
> Many of the items I repaired were of Western European construction...I was

> thoroughly familiar with Western European technology, electrical distributors, etc. Because I had this type of experience for more than twelve years it was relatively easy for me to learn to repair the types of European machinery used at my present employer.
>
> The state owned enterprise I worked for also had a division which repaired trucks and autos owned by the state. However, I only was required to repair trucks or cars on an occasional basis. My primary work involved machinery operated by electricity.

(AF 13).

In his letter, dated May 22, 1996, Employer's President, Vlado R. Dukcevich, stated, in pertinent part:

> Daniele Prosciutto was established more than twenty years ago & presently employs approximately eight full time employees. We import/export, cure, process & distribute prosciutto & other meat products for both the foreign & domestic markets. Due to high volume of sales & necessity to meet demand we recently expanded our plant nearly sixty thousand square feet...(and)...now occupy nearly two hundred thousand square feet of space.
>
> When Jan Kalata was hired in September 1986 he had experience as a mechanic. During his employment from January 1974-March 1986 Mr. Kalata worked on all types of industrial machinery. This experience gave him a good background in understanding some of the operational principles of the types of machinery we operate. Having this basic knowledge he was hired & trained by a former employee for at least two years. After he was trained Mr. Kalata basically repaired all our machinery without assistance.
>
> The employee who trained him retired. Mr. Kalata continues to work today & is exemplary in his performance. When we filed the labor certification application in August 1995, Mr. Kalata already had nearly seven years full time experience as a fully trained mechanic, thoroughly familiar with the types of machinery we use.
>
> We do not have anyone in our company who can train any other person for the position. Mr. Kalata is extremely busy everyday (sic) & is even busier lately due to our recent expansion. Mr. Kalata is the only employee thoroughly familiar with our machinery. It is impossible for him to train anyone for the position.
>
> What makes the situation even more difficult is that the machinery we use is manufactured in Europe. It is European technology specifically geared to the prosciutto & meat product industry. There are very few individuals in the U.S. or

> even in Europe for that matter who are familiar with the technology/repair & operation of these types of machines. Therefore it is virtually impossible to find someone qualified for the position.
>
> ...(W)e recently purchased some additional machinery from Europe...(and) will be in need of a second mechanic to do the exact job duties performed as Mr. Kalata.
>
> ...(I)t is essential for us to have a qualified mechanic on staff on full time basis. It is impossible for us to train anyone. We must have our machinery operational on a daily basis in order to keep production & distribution on going...We are...willing to hire any qualified U.S. worker for the position we have available.

(AF 14-15).

In the Final Determination, the CO found the Employer's rebuttal to be inadequate. Specifically, the CO stated:

> The Notice of Findings questioned whether the alien had two years experience in the job offered of repairer performing the above job duties. The employer's rebuttal dated May 24, 1995 did not provide evidence of the alien's two years of experience prior to hire as a repairer in the field of processing proscuitto and meat products.
>
> The employer states when the alien was hired in 1986 he was an experienced mechanic. He was, however, as detailed on ETA 750, Form B, a car mechanic. In 1986 the employer felt the alien's basic knowledge in this area qualified him for the job opportunity and he was "hired and trained." The fact that the employer hired the alien without experience in the job offered and trained him displays the alien's lack of qualifications at the time of hire.
>
> If the employer could not provide documentation of the alien's experience prior to hire they were given the opportunity to reduce the minimum requirements and conduct a new recruitment. The employer did not choose this alternative but instead attempted to explain how he trained the alien to perform the job duties. It is therefor (sic) concluded ETA 750, Form A, does not represent the employer's actual minimum requirements since they were willing to hire the alien without two years experience in the job offered.
>
> Additionally the employer now states "we do not have anyone in our company who can train any other person for the position" as the alien is to (sic) busy. Yet they also believe "in the years to come I am certain we will be in need of a second mechanic to do the exact job duties as Mr. Kalata." It is therefore determined the employer is willing to train an additional employee in the future to perform the job

opportunity of repairer yet is not willing to do so now because they wish to hire the alien.[2]

For the above reasons certification can not be granted and is denied (AF 10)**.**

Upon review, we find that the CO's Notice of Findings and Final Determination are [deficient]. On the one hand, we fully agree with the CO that the Alien did *not* have the two years of experience in the job offered as is now being required. Although the Alien had experience as a car mechanic and in working with various other kinds of machinery, he did *not* have two years of experience working on the specialized prosciutto and other meat processing equipment, when he was hired by Employer (AF 85,13). However, in the Notice of Findings, the CO only offered the Employer two options to cure the deficiency: 1. Establish that the Alien had two years of experience in the job offered at the time of hire by Employer; or, 2. Reduce the requirements and conduct a new recruitment AF 18). The CO failed to suggest a third option, namely, that the Employer document "that it is not feasible to hire workers with less training or experience than that required by the employer's job offer." *See* 20 C.F.R. §656.21(b)(5).

Despite the CO's failure to suggest this option, and the CO's citing of the wrong regulation, the Employer sought to establish that it is not feasible to train a U.S. applicant, as the Employer had trained the Alien. The documentation, however, consists of bare assertions by the Employer's President. Although the Employer's President cites business expansion and the retiring of the person who had previously trained the Alien as reasons for the infeasibility of training a U.S. applicant, the Employer does not specify the positions and duties of the employees other than the Alien. The rebuttal does not address who makes repairs when the Alien is unavailable and/or who would make repairs if the Alien stopped working for the Employer. Accordingly, the documentation presented is insufficient. However, we find that the failure of the CO to even provide the "infeasibility" option in the Notice of Findings and/or to set forth the types of documentation that would have been acceptable may have contributed to the Employer's failure to adequately address the deficiency. The result is that we are unable, based upon this record, to determine whether it is infeasible to train U.S. applicants, as the Employer had trained the Alien. Thus, it is unclear whether the two years of experience in the job offered is the Employer's actual minimum requirement for the job opportunity. 20 C.F.R. §656.21(b)(5).

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[2]We question the logic of the CO's conclusion. Although the Employer may, in the future, need a second repairer, the Employer may also require that such person have two years of experience in the job offered prior to being hired.

ORDER

In view of the foregoing, this matter is **REMANDED** to the Certifying Officer with instructions to issue a supplemental Notice of Findings consistent with this opinion.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.